TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 210

EAST REPUBLICAN, APPELLANT,

vs.

S. HARRISON, AS TREASURER OF THE STATE OF MONTANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

FILED JUNE 15, 1931

(33,519)

(33,519)

SUPREME COURT OF THE UNITED STATES

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HART REFINERIES, APPELLANT,

vs.

W. E. HARMON, AS TREASURER OF THE STATE OF MONTANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

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IN DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS & CLARK

HART REFINERIES, Plaintiff,

vs.

W. E. HARMON, as Treasurer of the State of Montana, Defendant

AMENDED COMPLAINT—Filed March 10, 1926

Plaintiff files this its second amended complaint, and for cause of action alleges:

I

That at all times since on or about the 15th day of April, 1924, the plaintiff has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Missoula, Missoula County, Montana, and at all times herein mentioned has been, and still is, authorized and empowered to engage in manufacturing, refining, producing, and compounding gasoline and distillate, and to sell and distrubute the same; and said corporation, and all of the stockholders thereof, are citizens and residents of the State of Montana.

II

That at all times herein mentioned the defendant has been, has continued to be, and now is, the duly elected, [fol. 3] qualified and acting Treasurer of the State of Montana.

III

That under and by virtue of the provisions of Section 1, 2, 3 and 5 of Chapter 186 of the Laws of the Nineteenth Legislative Assembly of the State of Montana, for the year 1925, the plaintiff was required to pay to the defendant, as the State Treasurer of the State of Montana, a license tax, in an amount equal to two cents for each gallon of

gasoline and two cents for each gallon of distillate refined, manufactured, produced and compounded by the plaintiff as such distributor, and sold by plaintiff in the State of Montana, or shipped, transported or imported by the plaintiff into, and distributed and sold by plaintiff within the State of Montana after it had arrived in and was brought to rest within the State of Montana, whether sold in original packages or in the broken packages, during such year.

IV

That for the quarter ending upon the 30th day of September, 1925, the plaintiff refined, manufactured, produced and compounded and sold in the State of Montana, Three Hundred and Three Thousand Five Hundred and Ninety-two (303,592) gallons of gasoline and distillate. That by reason thereof the plaintiff become liable for a license tax of two cents per gallon upon said quantity of gasoline and distillate, for the quarter ending September 30th, 1925, in the sum of Six Thousand and Seventy-one Dollars and Eighty-four cents ($6,071.84). That the plaintiff did not ship nor transport any gasoline or distillate into the State [fol. 4] of Montana.

V

That on the 30th day of October, 1925, and within thirty days after the end of the quarter ending September 30th, 1925, for which said license tax was due in accordance with the provisions of Section 3 of the said Chapter 186 of the Laws of the State of Montana for the year 1925, the plaintiff paid said sum of Six Thousand Seventy-one Dollars and Eighty-four cents ($6,071.84) to the defendant, as the State Treasurer of the State of Montana, to be held by him pending the outcome of this action to recover the same as paid under written protest that said tax was unlawful, which said sum was so received and accepted by him, and his receipt issued therefor.

VI

That the plaintiff deemed said license tax, and the whole thereof, to be unlawful, and at the time said license tax was paid, and before said tax became delinquent, the plain-

tiff paid said tax in said sum of Six Thousand Seventy-one Dollars and eighty-four cents ($6,071.84), to the defendant as State Treasurer of the State of Montana, under written protest that the same was unlawful, and said defendant received and accepted the same as so paid.

VII

That during all of the times herein mentioned the Continental Oil Company, Spokane Oil & Refining Company, the Pure Oil Company, the Mid-West Refining Company, The Producers and Refiners Company, the Standard Oil Company of California, and the Utah Oil Refining Company, and other corporations, have been, and each thereof now is, respectively, a corporation organized and existing under and by virtue of the laws of some State of the United States other than the State of Montana, but that the defendant [fol. 5] is not informed as to the State under the laws of which said corporations or any of them are organized, and that each and all of said corporations at all times herein mentioned has been and still is authorized to do business in the State of Montana, under the laws thereof applicable to foreign corporations.

VIII

That on and prior to the first day of April, 1925, said corporation and each thereof were, and at all times since, have been and now are engaged in the manufacturing, refining, producing and compounding of gasoline and distillate at places within the United States outside of the boundaries of the State of Montana, and that during said time they were engaged in the shipment and transporting into the State of Montana of gasoline and distillate, great quantities of which were sold by them outside of the State of Montana, and also great quantities of which were so sold within the State of Montana, before it was brought to rest in the State of Montana, to persons, corporations and concerns within this State.

IX

That during all of said time the said corporations mentioned in Paragraphs VII and VIII have had and maintained within the borders of their respective states out-

side of the State of Montana, and also within the State of Montana, their respective places of business from which they, and each of them, have at all times herein mentioned and have continued until the present time, to make sales of gasoline and distillate within said respective states outside of the State of Montana, and also within the State of Montana, before it arrives in and was brought to rest in Montana, for delivery, and which have been delivered at [fol. 6] all times since the first of April, 1925, and prior thereto, by such respective corporations, to persons, corporations, dealers, consumers and users in the State of Montana, and in the County of Missoula, and the territory occupied by plaintiff, in large quantities, to wit: to various of such parties in quantities during the period from April 1st, to June 30th 1925, and from July 1st to September 30th, 1925, ranging from One Hundred Thousand (100,000) gallons for said respective corporations, parties and persons, and up to and at the rate of 400,000 gallons a year, and amounting in the aggregate to several million gallons.

X

That by the sale of such gasoline and distillate so sold, before the same has arrived and been brought to rest in Montana, to corporations, persons and concerns within this State in the manner aforesaid, said corporations, persons and concerns, engaged in such sales have been at all times since the first day of April, 1925, and still are, competing with this plaintiff in the sale of gasoline and distillate to persons and concerns residing and doing business within said state of Montana.

XI

That said plaintiff began manufacturing, refining and compounding of gasoline and distillate at its refinery at the City of Missoula, in the County of Missoula, Montana, on or about the 15th day of April, 1924, and has been so engaged therein at all times thereafter, and has at all times since said date sold gasoline and distillate to its customers and patrons in the State of Montana.

XII

That none of the persons, corporations or concerns, men-
[fol. 7] tioned in Paragraph VII and VIII of this complaint, and engaged in the manufacturing, refining and compounding of gasoline and distillate, and the transportation and shipment of the same into the State of Montana, and the sale thereof inside or outside of the State of Montana to their respective customers within the State of Montana, before the same has arrived and been brought to rest in the State of Montana, and then resold, has been, or is required to pay to the State Treasurer of the State of Montana the sum of two cents per gallon, nor any other sum whatsoever as a license tax or any other tax upon the sale of said gasoline and distillate.

XIII

That in addition to the above named foreign corporations, other companies, organized under the laws of the State of Montana and elsewhere, and individuals, the names of which said corporations and individuals are unknown to this plaintiff, were, on and prior to said first day of April, 1925, and ever since have been, and now are, engaged in the State of Montana in the selling and distribution of gasoline and distillate to persons residing within said state.

XIV

That the plaintiff being a "distributor", as said term is herein used, means and includes every corporation engaged in the business in the State of Montana of refining, manufacturing, producing and compounding of gasoline and distillate and selling the same in this state and hereinafter designated as "manufacturing distributor."

XV

That besides said foreign manufacturer and distributor hereinbefore mentioned and said "manufacturing distributor" there are other competitors of plaintiff designated herein as "non-manufacturing distributors" and "dealers."

XVI

[fol. 8] That said "non-manufacturing Distributors" as herein used, means and includes every person and corporation who engages in the business in the State of Montana of shipping, transporting or importing any gasoline or distillate and making original sales of the same in this state.

XVII

That the term "dealer" as herein used, means and includes every person and corporation (other than said manufacturing distributor and non-manufacturing distributor) who engages in the business in the State of Montana of distributing and selling gasoline and distillates within this State.

XVIII

That the plaintiff is a manufacturing distributor, engaged in the manufacture and sale of gasoline and distillate in the State of Montana; that the plaintiff has a refining and manufacturing plant at Missoula, Montana, and manufactures and sells said products in the City of Missoula and in the territory of Western Montana, extending to the Idaho and Canadian lines, tributary to its said location; that under said law the plaintiff is liable for the payment of two cents per gallon upon every gallon of gasoline and distillate manufactured and sold, for the privilege of conducting its said business. That the said corporations mentioned in Paragraphs VII and VIII are competitors of plaintiff in the State of Montana, and solicit and ship orders to dealers and non-manufacturing distributors in Montana of gasoline and distillate in the territory of plaintiff in the State of Montana, and to consumers in said territory, and sell said products before they arrive and are brought to rest in the State of Montana, and the said corporations being competitors of plaintiff, in its said territory, from neighboring states, so sell, transport and ship the same into the State of Montana, and in the territory of plaintiff, at a [fol. 9] price of two cents per gallon less than the market price, by deducting and having deducted the two cents per gallon, which plaintiff is required to pay under said law, but which neither said competitors of plaintiff, said dealers, non-manufacturing distributors or consumers are required

to pay on such as is transported from without the state and is not resold after being brought to rest in Montana. That by reason of this discrimination of two cents per gallon, plaintiff is unable to compete with said corporations from other states in the territory of plaintiff in securing the business of non-manufacturing distributors, dealers, users and consumers in plaintiff's territory in Montana. That among the important consumers for whose business plaintiff is unable to compete in its territory by reason of their exemption from said tax when they buy gasoline which is shipped from out of the State, but purchased before it has been brought to rest in this state, are the Chicago, Milwaukee and St. Paul Railway Company and the Northern Pacific Railway Company, who, prior to the enactment of said law, were important and profitable customers of plaintiff, but whose business by reason of the premises has been lost to plaintiff.

XIX

That the plaintiff as such manufacturing distributor engaged in the manufacture and sale of gasoline and distillate in this State is required to pay said license tax of two cents per gallon for every gallon manufactured and sold for the privilege of conducting its business; that its competitors mentioned in Paragraphs VII and VIII are established in neighboring states; that said non-manufacturing distributors and dealers are also engaged in the business in this State, in the territory of plaintiff, of distributing and selling gasoline and distillate within the state; that said com- [fol. 10] petitors named in Paragraphs VII and VIII and XVI solicit orders for and ship to dealers and consumers in Montana, large quantities of gasoline and distillate sold in Montana before it has arrived and is brought to rest in Montana, and also large quantities of gasoline and distillate sold in the said neighboring state before it has been brought to rest in the State of Montana; that besides being such dealers in the sale and delivery of said gasoline and distillate, many of the said dealers operate other lines of business requiring the use of many delivery automobiles in delivering gasoline to their customers, their own service stations located over several counties, running delivery trucks for mercantile businesses owned by them, besides running touring cars and trucks for their own use and en-

joyment; that said dealers respectively use large amounts of gasoline for their own consumption and use, that if such dealers purchase their supplies from the plaintiff or other Montana manufacturing distributors, the license tax of two cents is payable on all such sales, which are required to be reported by the plaintiff; when, however, such dealers and consumers purchase their supplies from said competitors of plaintiff who sell and ship same from neighboring states, or sell the same before it is brought to rest in Montana, the dealer receives the same, delivered to him in Montana, tax free, and the tax is not required to be met on such sales, as is required of the plaintiff and Montana manufacturing distributors. That the dealer being absolved from all tax until required to be reported by him within thirty days after the end of the quarter, and then, for such quantity only as has been resold by such dealer, as is provided by Sections 2383 and 2384, as amended by Sections 2 and 3 of Chapter 186 of the Laws of 1925 of the State of Montana, such dealers are entitled to have all that they procure for their own consumption and use tax free; that neither [fol. 11] such dealers, foreign corporations or non-manufacturing distributors nor consumers of gasoline and distillate in Montana are required to pay the tax of two cents per gallon on such gasoline as is purchased by them before it is brought to rest in Montana, and are not required to pay a tax upon such imported gasoline and distillate they sell before the same has arrived in and is brought to rest in Montana; that by reason thereof not only said foreign corporations and non-manufacturing distributors, but the said dealers, who are also competitors of plaintiff in the sale and distribution of gasoline in plaintiff's territory, solicit orders and sell such gasoline and distillate tax free, as has been purchased by such dealers and resold by them before it comes to rest in Montana, and thereafter delivered from a foreign state direct in original packages to the consumer, or upon such resales as the dealer may make before it comes to rest in Montana, and thereafter delivered, either in broken or unbroken packages. The Montana dealer may purchase gasoline before it comes to rest in Montana resell the same before it has come to rest in Montana, and then after it has come to rest in Montana deliver the same either in broken or unbroken packages, tax free. That by

reason thereof, and of the premises, such dealers and consumers cease and refuse, and have ceased and refused, to purchase from Montana manufacturing distributors, and from plaintiff, but purchase from plaintiff's said competitors. That such non-manufacturing distributors and dealers located in Montana, who purchase from the plaintiff or a Montana manufacturing distributor, gasoline and distillate, which carries said two cent per gallon tax, is unable to compete with the non-manufacturing distributor, or dealer located in Montana, who purchases said gasoline and distillate before it has arrived in and is brought to rest in the [fol. 12] State of Montana, which is free from said two cent tax and any tax whatsoever. By reason thereof, and of the premises, the plaintiff and the Montana Manufacturing distributors who manufacture and refine their gasoline and distillates, in the State of Montana, are unjustly discriminated against, and plaintiff's customers have been, and now are, lost to the plaintiff and by reason of the premises and the said tax of two cents per gallon plaintiff has to pay which his said competitors are not required to pay, the plaintiff is unjustly and arbitrarily discriminated against by reason of being a manufacturer and general taxpayer in the State of Montana and is unable to compete with his said competitors in plaintiff's own territory in securing business of non manufacturing distributors, dealers and consumers in his territory.

XX

That by reason of the premises and on account of the aforesaid discrimination in favor of the said corporations in Paragraphs VII and VIII herein mentioned, and against this plaintiff, the plaintiff during the period from the beginning of its operation April 1st, 1924 to September 30th 1925, lost the sale of a large quantity of gasoline and distillate to persons residing within the State of Montana, upon which said plaintiff would have realized a profit of Three Thousand Dollars ($3,000.00) for the quarter ending June 30, 1925, and a profit of Four Thousand Dollars ($4,000.00) for the quarter ending September 30, 1925; and will, in the future, lose the sale, to persons residing within the State of Montana, of large quantities of gasoline and distillate

monthly, upon which the plaintiff would make a profit of approximately Fifteen Hundred Dollars ($1,500.00) per month.

[fol. 13]

XXI

That by reason of the premises and on account of the aforesaid discrimination in favor of said "non-manufacturing distributors" and "dealers", herein mentioned, and against this plaintiff, the plaintiff during the period from the beginning of its operations April 1st, 1924 to September 30th, 1925, lost the sale of a large quantity of gasoline and distillate to persons residing within the State of Montana upon which said plaintiff would have realized a profit of Three Thousand Dollars ($3,000.00) for the quarter ending June 30, 1925, and a profit of Four Thousand Dollars ($4,000.00) for the quarter ending September 30, 1925; and will, in the future, lose the sale, to persons residing within the State of Montana, of large quantities of gasoline and distillate monthly, upon which the plaintiff would make a profit of approximately Fifteen Hundred Dollars ($1,500.00) per month.

XXII

That the imposition or attempt to impose a license tax at the rate of two cents per gallon upon the gasoline and distillate sold by plaintiff to persons within the State of Montana has been the sole cause of the inability of plaintiff to sell to persons within the State of Montana gasoline and distillate at the prices which have been paid by such persons to the corporations and individuals hereinbefore mentioned, which have shipped, and transported said gasoline and distillate from places outside of the State of Montana into said State as aforesaid, and but for said tax said plaintiff would be able to meet such prices and to sell substantially all the gasoline which it manufactures or has heretofore manufactured, to persons within the State of Montana, but that on account of the imposition of said tax, said plaintiff will be compelled to attempt to develope markets for its said gasoline and distillate so manufactured within the State of Montana, in other States in the United States and [fol. 14] Canada.

XXIII

That the State of Montana does not regulate the manufacturing, refining or compounding of gasoline and distillate, or the sale or distribution thereof within the State of Montana, and no part of the license tax prescribed by the Statutes of this State is used by the State in police regulation or supervision of oil refineries, or the sale or distribution of gasoline and distillate manufactured thereat, but said license tax when paid, is used for similar purposes as the use made of taxes levied upon and against real and personal property in the State of Montana, and such license tax is exacted of the sellers and distributors of gasoline and distillate who manufacture, refine and produce such gasoline and distillate within the State of Montana, for revenue purposes.

XXIV

That by reason of the premises the plaintiff is denied the equal protection of the laws as against its competitors established in other states, in the State of Montana and in plaintiff's territory in Missoula, and Western Montana, and is unable to compete under said law permitting such unreasonable and unlawful discrimination.

XXV

That by reason of the premises and the fact that no license tax or other tax is required to be paid as set forth in this complaint, of two cents per gallon, or otherwise, or at all, upon the sale of such gasoline and distillate, the plaintiff has been and is discriminated against by virtue of the imposition of the license tax of two cents per gallon upon such gasoline and distillate manufactured and refined by it and sold by it to its patrons and customers residing in the State of Montana, and said foreign corporations and plaintiff's competitors purchasing gasoline and distillate before it has come to rest in Montana, and has [fol. 15] then been resold, not being required to stand or to pay such two cents per gallon or any other sum upon such gasoline and distillate so sold, have been and still are able to sell such gasoline and distillate to their said customers at least two cents per gallon less than the plaintiff, and other manufacturing distributors on account of

said license tax, and have at all times been and are able to so sell gasoline and distillate of the same or similar character, to its customers and patrons within this state, and thereby said foreign corporations, non-manufacturing distributors and dealers, so engaged in said business, and corporations organized in states without the State of Montana have been at all times herein mentioned and still are, under the provisions of Sections 2382, 2383 and 2384 of the Revised Codes of Montana, as amended by the provisions of Section One (1), Two (2), and Three (3) of Chapter 186 of the Laws enacted by the Nineteenth Legislative Assembly of Montana, for the year 1925, permitted, within the State of Montana, to exercise and enjoy, within the state of Montana, greater rights, privileges and immunities, under the laws of this State than those enjoyed by plaintiff, a domestic corporation and other manufacturing distributor corporations, of similar character created under the laws of the State of Montana, which is in violation and contravention of Section Eleven (11) of Article XV of the Constitution of the State of Montana. That the provisions of said statutes of the State of Montana, imposing said license tax constitute and are also unjust, unreasonable, and arbitrary discriminations against this plaintiff, and other manufacturing distributors, and such dealers and distributors as purchase from the plaintiff and other manufacturing distributors, located in Montana, in favor of foreign corporations and other corporations and persons, non-manufacturing distributors, dealers and distributors who purchase said gasoline and distillate before it has arrived and been brought to rest in the State of Montana, and the [fol. 16] plaintiff and said manufacturing distributors, and such dealers, persons and distributors as purchase said gasoline and distillate from Montana manufacturing distributors, are denied the equal protection of the law, and said law is not of uniform operation and is not of uniform incidence upon the same class of subjects, to-wit: upon gasoline and distillate sold by corporations organized under the laws of the State of Montana, being manufacturing distributors, within the territorial limitations of the authority of the State of Montana, which levies said tax, and such as is sold in other states to non-manufacturing distributors, dealers and consumers within the State of Montana, before

it has arrived and been brought to rest in the State of Montana, and such as is sold in the State of Montana, before it has arrived and has been brought to rest in the State of Montana, by foreign corporations, non-manufacturing distributors, domestic corporations, dealers and individuals doing business in the State of Montana, and purchasing the same before it has arrived and been brought to rest in the State of Montana, that by reason thereof and of the premises, the said provisions of the said Montana law are in violation and contravention of the following constitutional provisions, to-wit:

Sections One (1), Four (4), Seven (7) and Eleven (11) of Art. XII the Constitution of the State of Montana, and Section Two (2) Article (IV) Four of the Constitution of the United States and Section One (1), Article XIV of Amendments to the Constitution of the United States.

XXIX

That Section 5 of Chapter 186 of said laws of the Legislative Assembly of Montana for the year 1925, whereby it is provided that fifty-five per cent of the money received by the State Treasurer under the provisions of said Act, [fol. 17] shall at the end of each fiscal year be prorated equally among and be paid over to each of the several counties of the State, to the credit and use of the general road funds, and for the maintenance and construction of highways therein, is in violation and contravention of Section 4 of Article XII of the Constitution of Montana, which provides that the Legislative Assembly shall not levy taxes upon the inhabitants or property in any county for county purposes, but it may, by law, invest the corporate authorities thereof with powers to assess and collect taxes for such purposes.

XXX

That the said Section 5 of Chapter 186, wherein it provides that at the end of each fiscal year the State Treasurer shall pro rate among and pay over to each of the several counties of the State fifty-five per cent of said gasoline tax, is violative and in contravention of Article 5, Section 26, of the Constitution of the State of Montana, providing that the Legislative Assembly shall not pass local or special

laws for laying out, opening, altering or working roads or highways. That by reason thereof and of the premises, said license tax imposed is unlawful and void.

XXXI

That the provisions of Sections 2382, 2383, 2384, 2389 and 2392 of the Revised Codes of Montana of 1921, as amended by Section 1, Section 2, Section 3, Section 4 and Section 5 of Chapter 186 of the Nineteenth Legislative Assembly of Montana for the year 1925, are in violation and contravention of Article V, Section 26, of the Constitution of the State of Montana, wherein it is provided that the Legislative Assembly shall not pass local or special laws for assessment or collection of taxes. That by reason thereof and of the premises, the imposition of said gasoline license tax, which is a special tax upon gasoline and dis-[fol. 18] tillate, as distinguished from all other kinds and forms of property, is unlawful and void.

XXXII

That by reason thereof, and of the premises, there is due and owing from the defendant to the plaintiff the said sum of Six Thousand Seventy-one Dollars and Eighty-four cents ($6,071.84) paid by the plaintiff to the defendant under protest as aforesaid, no part of which has been paid, and the plaintiff is damaged in said sum of Six Thousand Seventy-one Dollars and Eighty-four Cents ($6,071.84).

Wherefore plaintiff demands judgment against the defendant for the sum of Six Thousand Seventy-one Dollars and Eighty-four Cents ($6,071.84) damages, and for costs of suit.

John E. Patterson, Attorney for Plaintiff.

In District Court of Lewis and Clark County

Answer to Second Amended Complaint—Filed March 16, 1926

Comes now the defendant in the above entitled action and, for answer to the second amended complaint of plaintiff on file herein, admits, denies and alleges as follows:

Admits the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI thereof, save and except that defendant denies that the Spokane Oil & Refining Company, Standard Oil Company of California, the McMillan Petroleum Products Company of California, and the Utah Oil Refining Company, or any of them, are authorized to do business in Montana, and alleges that he has insufficient knowledge or information to form a belief as to whether any of the corporations named in paragraph VII of said second amended complaint, or any other corporations or [fol. 19] individuals maintaining their places of business outside of Montana, have, during the times referred to in the second amended complaint, or at any time, been engaged in the shipment or transporting into the State of Montana of gasoline or distillate, or as to whether any of them made sales of gasoline or distillate within their respective states outside of Montana, or within the State of Montana, before it arrived in and was brought to rest within Montana, for delivery to persons, corporations, dealers, consumers, or users, in Montana, or the County of Missoula, in the quantities alleged in paragraph IX thereof, or in any other amount, or as to whether any of said corporations or individuals, during the time referred to in plaintiff's second amended complaint, or at any time, have been competing with plaintiff in the sale of gasoline or distillate to persons residing in, or doing business, in Montana, and therefore, denies the same.

II

Admits, if any of the corporations, referred to in paragraph XII, sell gasoline as therein alleged, they are not required to pay any tax in Montana and, in this connection, alleges that whatever gasoline or distillate, if any, is sold tax free by the person, corporation, and concerns therein mentioned to dealers in the State of Montana, and resold by such dealers in Montana, the dealers are obliged to pay a tax of 2c per gallon upon the sale thereof, whereas the same dealers are not obliged to pay any tax upon gasoline or distillate purchased by them from the plaintiff and resold in the State of Montana; that, by reason thereof, the plaintiff can obtain 2c per gallon more for its gasoline sold

to dealers in Montana, for resale by them, than can the persons, corporation, and concerns therein mentioned.

[fol. 20] III

Admits the allegations of paragraphs XIII and XIV thereof.

IV

Alleges that he has insufficient knowledge or information to form a belief as to the allegations of Paragraph XV thereof.

V

Admits the allegations of paragraphs XVI and XVII thereof.

VI

Admits the allegations of Paragraph XVIII thereof, save and except that defendant alleges that he has insufficient knowledge or information upon which to form a belief as to whether the corporations therein referred to, or any of them, solicit or ship orders to dealers or non-manufacturing distributors of gasoline or distillate in Montana in the territory of plaintiff, or to consumers in said territory, or as to whether they sell said products before they arrive and are brought to rest in the State of Montana, as therein alleged, and therefore, denies the same, and denies that the corporations therein referred to are competitors of plaintiff, and denies that they, or any of them, sell, transport or ship any gasoline or distillate, or either thereof, in the territory of plaintiff at a price of 2c per gallon, or any other price, less than the market price, and denies that, by reason of any discrimination against plaintiff, the plaintiff is unable to compete with said corporations from other states in the territory of plaintiff in securing the business of dealers, non-manufacturing distributors, users, or consumers in plaintiff's territory in Montana, and denies that plaintiff is unable to compete with said other corporations, or any of them, in securing the business of the Chicago, Milwaukee & St. Paul Ry. Co., or the Northern Pacific Ry. Co., or either of them, and alleges that, if plaintiff has lost

the business of said companies, as therein alleged, it was [fol. 21] not due to the statute imposing the tax therein referred to, and it was not due to any discrimination worked by said law against plaintiff.

VII

Admits the allegations of paragraph XIX, save and except that defendant alleges that he has insufficient knowledge or information to form a belief as to whether any of the corporations therein referred to solicit and ship orders for gasoline to dealers or consumers in Montana as therein alleged, or at all, and defendant denies that dealers in the State of Montana cease or refuse, and denies that they, or any of them, have ceased or refuse to purchase gasoline or distillate from Montana Distributors, or from plaintiff, but purchase from plaintiff's competitors by reason of any advantage accorded by the statute in question.

Denies that the Montana refiner, manufacturer, or distributor, or plaintiff, are, or any of them have been, unjustly, or at all, discriminated against; denies that plaintiff's customers have been or are lost to plaintiff by reason of any discrimination in the payment of said tax, or by reason of the quantity of gasoline consumed by dealers tax free as therein alleged, and denies that, by reason of any discrimination, plaintiff is unable to compete with its competitors in plaintiff's territory in securing business of dealers in said territory.

VIII

Denies each and every allegation, matter and thing contained in paragraphs XX, XXI, and XXII thereof, save and except that defendant admits that plaintiff and other distributors of gasoline in Montana realize exorbitant profits from the sale of gasoline, and, if plaintiff lost sales as therein alleged, it undoubtedly lost large sums of money in the way of profits.

IX

Admits that the State of Montana does not regulate the manufacturing, refining or compounding of gasoline or dis-

tillates, or the sale or distribution thereof within the State of Montana.

[fol. 22] Admits the other allegations of paragraph XXIII thereof.

X

Denies each and every allegation, matter and thing contained in paragraphs XXIV and XXV thereof.

XIII

Admits that the tax in question is distributed as provided in Section 5 of Chapter 186 of the Laws of 1925.

Denies specifically each and every other allegation, matter and thing contained in paragraph XXIX thereof.

XIV

Denies specifically each and every allegation, matter and thing contained in paragraphs XXX, XXXI and XXXII thereof.

Save and except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation, matter and thing contained in plaintiff's second amended complaint.

Further answering said second amended complaint, defendant alleges:

V

Defendant further alleges that, if any discrimination results because of the tax or statute in question, the same is due to the fact that the State of Montana is without authority to impose any tax upon interstate commerce, and the same results, without any hostile intent, to discriminate against plaintiff or against any other distributor or dealer in gasoline in Montana, and without any purpose to intentionally favor any distributor or dealer in any other state.

Wherefore having fully answered plaintiff's second amended complaint, the defendant prays that plaintiff take

nothing by its action, and that the defendant have judgment for his costs of suit herein.

L. A. Foot, Attorney General; A. H. Angstman, As-
[fol. 23] sistant Attorney General, Attorneys for Defendant.

In District Court of Lewis and Clark County

Demurrer to Answer—Filed Aug. 7, 1926

Comes now the plaintiff and demurs to the Answer of the defendant as amended, on file in the above entitled action, on the following grounds:

I

That said answer does not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's Second Amended Complaint.

Dated this 3rd day of August, 1926.

John E. Patterson, Attorney for Plaintiff.

In District Court of Lewis and Clark County

Order Overruling Demurrer—August 7, 1926

Plaintiff's demurrer to the amended answer of the defendant was this day submitted without argument, by the Court overruled and the plaintiff given 10 days in which to plead further to the answer as amended.

A. J. Horsky, Judge.

To which ruling the plaintiff excepts.

In District Court of Lewis and Clark County

Reply—Filed Aug. 18, 1926

[fol. 24] Comes now the plaintiff in the above entitled action, and for reply to the Answer of the defendant as

amended, on file herein, admits, denies and alleges as follows:

I

Plaintiff denies all new and affirmative matter set forth in said answer, except in so far as the allegations thereof are admissions of allegations of plaintiff's complaint.

Wherefore plaintiff prays judgment as demanded in plaintiff's complaint.

Dated this 7th day of August, 1926.

Duly verified.

John E. Patterson, Attorney for Plaintiff.

In District Court of Lewis and Clark County

Motion for Judgment—Filed Jan. 25, 1927

Comes now the defendant in the above entitled action, and moves the Court for judgment on the pleadings in said action in favor of defendant and against the plaintiff.

L. A. Foot, Attorney General; A. H. Angstman, Assistant Attorney General, Attorneys for Defendant.

In District Court of Lewis and Clark County

Order Sustaining Motion—February 5, 1927

In this cause, hearing on the motion of the defendant for judgment on the pleadings, came on regularly this day, present plaintiff by counsel, John E. Patterson, Esq., and the defendant by counsel, A. H. Angstman, Esq. Whereupon, after arguments by counsel for the respective par-

[fol. 25] ties, Court Ordered that the motion of the defendant for Judgment on the pleadings be and is hereby sustained. Thereupon Court Ordered that the plaintiff be and is hereby given 60 days additional to the time allowed by law, in which to prepare, serve and file bill of exceptions herein.

A. J. Horsky, Judge.

To the Order of the Court that the motion of the defendant for judgment on the pleadings be sustained the plaintiff excepts.

In District Court of Lewis and Clark County

Order to Enter Judgment—February 10, 1927

In this cause, Court this day Ordered that Judgment be entered herein in favor of the defendant and against the plaintiff.

A. J. Horsky, Judge.

To which order the Plaintiff excepts.

In District Court of Lewis and Clark County

Judgment—Filed Feb. 10, 1927

The defendant's motion for judgment on the pleadings in the above entitled action having on the 5th day of February, 1927, come on regularly for hearing, Hon. John E. Patterson appearing on behalf of plaintiff and A. H. Angstman, Assistant Attorney General, appearing on behalf of the defendant, and arguments having been made by respective counsel, and after due consideration and deliberation [fol. 26] the Court sustained defendant's motion for judgment on the pleadings:

Wherefore, by virtue of the law and the premises aforesaid, it is hereby Ordered, Adjudged and Decreed that plaintiff take nothing by its action, and that defendant have judgment against the plaintiff for its cost of suit herein, taxed in the sum of $—, and it is further ordered, Adjudged and Decreed that the plaintiff has no further right, title or interest in or to the sum of $6,071.84 involved in this action, and which was paid by the plaintiff under protest, and it is ordered that said sum be by the defendant State Treasurer taken from the "Protest License Fund" and deposited to the credit of the funds to which it belongs, as provided in chapter 186, Laws of 1925.

A. J. Horsky, District Judge.

To which Plaintiff excepts.

In District Court of Lewis and Clark County

Order Extending Time—April 4, 1927

The Court, by order duly made and given, granted the plaintiff sixty (60) days in addition to the time allowed by statute in which to prepare and serve and present his Bill of Exceptions and proposed Bill of Exceptions.

[fol. 27] In District Court of Lewis and Clark County

Bill of Exceptions and Order Settling Same—Filed April 9, 1927

Be it remembered that the Motion for Judgment on the Pleadings in the above entitled cause in the above entitled Court, came on regularly for hearing on the 5th day of February, 1927, before the Court, Honorable A. J. Horsky, Judge Presiding, John E. Patterson, Esq., Attorney at law, appearing on behalf of the Plaintiff, and Hon. A. A. Angstman, Assistant Attorney General, appearing on behalf of the Defendant, and the following proceedings were had, and the following rulings made, and none other. Exactly here follows the pleadings in the case:

Second Amended Complaint

Reference is hereby made to the Second Amended Complaint set forth in the Judgment Roll at Pages 2 to 18, in accordance with the provisions of Par. d. of Paragraph 5 of Division VII of the Rules of the Supreme Court.

Answer to Second Amended Complaint

Reference is hereby made to the Answer to the Second Amended Complaint set forth in the Judgment Roll at Pages 18 to 22, in accordance with the provisions of paragraph d, of Paragraph 5, of Division VII of the Rules of the Supreme Court.

Demurrer to Answer as Amended

Reference is hereby made to Demurrer to the Answer as Amended set forth in the judgment roll at Page 23.

Order Overruling Demurrer

Title of Court

Title of Cuase

Done in Open Court August 7th, 1926

Plaintiff's demurrer to the amended answer of the defendant was this day submitted without argument, by the Court overruled and the plaintiff given 10 days in which [fol 28] to plead further to the answer as amended.

A. J. Horsky, Judge.

To which ruling the plaintiff excepts.

Reply

Reference is hereby made to the Reply set forth in the judgment roll at pages 23 to 24, in accordance with par. d, of Paragraph 5, Division VII, Rules of the Supreme Court.

Motion for Judgment on the Pleadings

Reference is hereby made to the Motion for Judgment on the Pleadings set forth at page 24 of the Judgment Roll in accordance with the provisions of par. d, of Paragraph 5, Division VII of the Rules of the Supreme Court.

(Minute Entry)

Title of Court

Title of Cause

Done in Open Court February 5th, 1927

In this cause, hearing on the motion of the defendant for judgment on the pleadings, came on regularly this day, present plaintiff by counsel, John E. Patterson, Esq., and the defendant by counsel, A. H. Angstman, Esq., whereupon after arguments by counsel for the respective parties, Court Ordered that the motion of the defendant for judgment on the pleadings be and is hereby sustained. Thereupon Court ordered that the plaintiff be and is hereby given 60 days additional to the time allowed by law, in which to prepare, serve and file bill of exceptions herein.

A. J. Horsky, Judge.

To the order of the Court that the motion of the defendant for judgment on the pleadings be sustained the plaintiff excepts.

[fol. 29]

(Minute Entry)

Title of Court

Title of Cause

Done in Open Court This 10th Day of February, 1927

In this cause, Court this day Ordered that Judgment be entered herein in favor of the defendant and against the plaintiff.

A. J. Horsky, Judge.

To which order the Plaintiff excepts.

Judgment

Title of Court

Title of Cause

...ference is hereby made to the Judgment set forth at ...es 25 to 26 of the Judgment Roll in accordance with ...e provisions of par. d, of Paragraph 5 of Division VII of ...e Rules of the Supreme Court.

To Which Plaintiff excepts.

Service of the foregoing Bill of Exceptions admitted and copy thereof received this 5th day of April, 1927, and further, the defendant admits its correctness, and agrees that the same in foregoing form may be forthwith signed, settled and allowed, and ordered filed.

L. A. Foot, Attorney General; A. H. Angstman, Assistant Attorney General, Attorneys for Defendant.

Order Settling Bill of Exceptions

The foregoing bill of exceptions is full, true and correct and contains all of the pleadings introduced, and all other proceedings had, at the hearing of said Motion for Judgment on the Pleadings; it is now signed, settled and al-

[fol. 30] lowed as such, and ordered filed in the cause by the Clerk.

Dated at Helena, Montana, this 9th day of April, 1927.

A. J. Horsky, Presiding Judge.

Filed before settlement April 5, 1927.
Filed after settlement April 9th, 1927.

In District Court of Lewis and Clark County

Notice of Appeal—Filed Aug. 1, 1927

You will please take notice that the Hart Refineries, the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Montana, from the judgment therein entered, in the said District Court, on the tenth day of February, 1927, in favor of the defendant in said action, and against said Hart Refineries, plaintiff, and from the whole thereof.

Dated this 26th day of July, 1927.

Yours, etc., John E. Patterson, Attorney for Plaintiff.

To the Clerk of said District Court and L. A. Foot, Attorney for Defendant.

Receipt of copy of notice of appeal acknowledged August 2, 1927.

L. A. Foot, Attorney for Defendant.

In District Court of Lewis and Clark County

Praecipe for Transcript of Record—Filed Sept., 1927

You will please prepare and certify a transcript on appeal [fol. 31] to the Supreme Court of the State of Montana from the Judgment entered in the above entitled action on the 10th day of February, 1927, said transcript to be in conformity with the rules of the Supreme Court and to embrace and include the following papers, records and minutes in said cause, to-wit:

1. The judgment roll containing:
(a) The second amended complaint.
(b) Answer to the Second Amended Complaint.
(c) Demurrer to the Answer as Amended.
(d) Order Overruling Demurrer.
(e) Reply to the Answer.
(f) Motion for Judgment on the Pleadings.
(g) Order Sustaining Motion for Judgment on pleadings.
(h) Order that Judgment be entered for defendant.
(i) Judgment.
(j) Certificate to Judgment Roll.
(k) Minute Entry extending time to prepare Bill of Exceptions.
(l) Bill of Exceptions.
Order Settling Bill of Exceptions.
Filing Bill of Exceptions.
(m) Notice of Appeal.
(n) Præcipe for Transcript.
(o) Your certificate to this transcript.

Dated this 20th day of September, 1927.
John E. Patterson, Attorney for Plaintiff.

[fols. 32 & 33] Certificate to foregoing transcript omitted in printing.

[fol. 34] In Supreme Court of Montana

Hart Refineries, a Corporation, Appellant,

vs.

W. E. Harmon, as Treasurer of the State of Montana, Appellee

Assignments of Error

1. The Court erred in overruling plaintiff's demurrer to the defendant's answer, for the reason that the provisions of the Montana gasoline tax law, upon which said tax was based, were unconstitutional and void by reason of which appellant was injured in its business in the respects hereinafter set forth.

2. The Court should have held sections 2382 and 2383 of Chapter 186 of the Laws of 1925, void, as being in violation, and contravention of the provisions of Section One (1) of Article Fourteen (14) of Amendments to the Constitution of the United States, which provides: "No State shall make or enforce any law, which shall deny to any person within its jurisdiction the equal protection of the laws."

4. The court should have held that said tax denied appellant the equal protection of the laws.

[fol. 35] In Supreme Court of Montana, December Term, 1927

HART REFINERIES, Plaintiff and Appellant,

vs.

W. E. HARMON, as State Treasurer of the State of Montana, Defendant and Respondent

OPINION AND JUDGMENT—Filed Jan. 31, 1928

[fol. 36] Mr. Justice GALEN delivered the opinion of the Court:

Under protest the plaintiff paid unto the defendant as state treasurer, for the quarter ending September 30, 1925, a license tax, pursuant to the provisions of Chapter 186 of the Laws of 1925, in an amount equal to two cents on each gallon of gasoline and distillate "refined, manufactured, produced and compounded by the plaintiff" and by it sold in the state, "or shipped, transported or imported by the plaintiff into, and distributed and sold by the plaintiff within the state of Montana after it had arrived in and was at a state of rest within the state * * * whether sold in original packages or in * * * broken packages." This action was instituted to recover the tax so paid. Judgment was entered upon the pleadings in defendant's favor and appeal is by the plaintiff prosecuted therefrom.

It is the plaintiff's contention that the statute upon the authority of which the tax was collected is unconstitutional. It is urged that it discriminates between Montana products

and those imported into the state; that it is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States; and also, section 11 of Article XII, section 11 of Article XV and section 26 of Article V of the state constitution. Section 1 of the Fourteenth Amendment, so far as applicable, provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor, (shall any state) deny to any person within its jurisdiction the equal protection of the laws." Section 11 of Article [fol. 37] XII of the state constitution provides that "taxes shall be levied and collected by general laws and for public purposes only," and that "they shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Section 11 of Article XV of the state constitution denies to foreign corporations engaged in business in this state "any greater rights or privileges than those possessed or enjoyed" by domestic corporations; and section 26 of Article V of our constitution restricts the legislative assembly, among other things, from passing a local or special law where a general law can be made applicable.

The statute provides: "As used in this Act, the term 'person' means and includes every individual, firm, association, joint stock company, syndicate and corporation. The term 'distributor' means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling the same in this state; and also every person who engages in the business in this state of shipping, transporting or importing any gasoline or distillate into, and making original sales of the same, in this state. The term 'dealer' means and includes every person, other than a distributor, who engages in the business in this states, of distributing or selling gasoline or distillate within the state." (Sec. 2381, R. C. 1921.)

The Act under attack (Chap. 186, Laws of 1925) is amendatory of the provisions of sections 2382, 2383, and 2392 of the Revised Codes of 1921, whereby it is provided, so far as pertinent here, that "every distributor shall pay * * * to the state treasurer a license tax for engaging in and carrying on such business in this state, in an amount

[fol. 38] equal to two cents for each gallon of gasoline, and two cents for each gallon of distillate refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into, and distributed and sold by him within this state, after it had arrived in and was brought to rest within this state, whether sold in the original packages or in the broken packages, during such year, provided that all gasoline and distillate distributed by any distributor to any of its service stations in this state shall be deemed to have been sold, and shall be treated and considered, in computing such license tax in the same manner as though the same had been sold to dealers or other persons." (Sec. 2382) "Every dealer shall * * * when engaged in such business in this state, pay to the state treasurer * * * a license tax for engaging in such business in this state, equal to two cents for each gallon of gasoline and two cents for each gallon of distillate sold or distributed by such dealer in this state during such year, provided however, that no gasoline or distillate sold by such dealer, which was purchased by him from a producer who had paid the tax theron, shall be included or considered in determining the amount of such license tax to be paid by such dealer, but only such gasoline and distillate as was shipped, transported or imported into this state and purchased by such dealer, before it had arrived in and was brought to rest within this state and then resold by such dealer, whether in the original packages or in broken packages, shall be included or considered for the purpose of computing the amount of such license tax." (Sec. 2383.)

The principal contention is that the law is discriminatory. Upon similar onslaught this Act has been by this court held to be unconstitutional (State v. Silver Bow Re-[fol. 39] fining Co., —Mont.,—; 252 Pac., 301.), and notwithstanding the elaborate brief and argument of learned counsel for the appellant, we see no good reason to change our views in this regard.

1. The statute is not violative of the Fourteenth Amendment to the Constitution of the United States. (State v. Silver Bow Refining Co., supra., That which would invalidate the law because of unjust discrimination has been thoroughly considered in the case last cited, and in the two cases

entitled State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428; 76 Mont. 472, 248 Pac. 186.

The law is now settled. As was well said by Mr. Justice Matthews, speaking for this court in the Silver Bow Refining Company case, "as to the contention that products may be imported into the state for consumption without the payment of a tax, and thus users are induced to deal with outside concerns when their needs are sufficiently great to warrant buying in bulk and thus withdraw their patronage from dealers within the state, the situation is one which cannot be remedied by state legislation. By sections 9 and 10, Art. I, of the Constitution of the United States, the regulation of interstate commerce is granted exclusively to the Congress; Congress has long since acted on the subject, and "the states have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control, the Operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." "Equal protection of the law is seldom, if ever, obtained; and because of the very frailty of human agencies, the authorities all recognize the right of the legislative branch of government to make reasonable classification of [fol. 40] subjects, for property or *or* occupation taxes (Hilger v. Moore, 56 Mont. 146, 182 Pac. 477), and if the classification is reasonable and if all of the subjects within a given class are accorded the same treatment, the legislation cannot be said to deny to anyone within such class the equal protection of the law, even though the burden imposed upon him may be more onerous than that imposed upon a member of another class. (Quong Wing v. Kirkendall, 39 Mont. 64, 101 Pac. 250; S. C., 223 U. S. 59, 56 L. Ed. 350, 32 Sup. Ct. Rep. 192; see also Rose's U. S. Notes)" (State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428.)

Under the authority of the case of Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, "it may be accepted • • • as settled beyond all further controversy that gasoline or distillate brought into this state from a sister state and stored in the original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufacured in this state. In other words, such gasoline or distillate, though brought here from another state and held in the original packages for sale in this state,

is subject to a property tax, or may be made the basis of an occupation tax, the same as gasoline or distillate manufactured in this state." (State v. Sunburst Refining Co., 73 M 68, 235 P. 428.) "It is enough that the classification is reasonably founded in the 'purposes and policies of taxation.'" (Watson v. State Comptroller, 254 U. S. 122, 65 L. Ed. 170, 41 Sup. Ct. Rep. 43.) It is not open to objection unless it precludes the assumption that the classification was made in the exercise of legislative judgment and discretion." (Stebbins v. Riley, 268 U. S. 137, 69 L. Ed. 884; Campbell v. California, 200 U. S. 87, 50 L. Ed. 382.)

[fol. 41] Referring to the Act under consideration here, this court has heretofore expressed opinion that it eliminates most, if not all, of the objectionable features contained in the statute before amendment. (State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428.) And it is noteworthy that the later Act of 1927, (Laws 1927, p. 604) in the language by it employed, is an improvement upon the statute here considered.

2. As to just how the Act is violative of the various provisions of the state constitution counsel have neither favored us with argument or authority. We have carefully considered and applied our constitutional provisions above alluded to, and do not find the Act in violation of any thereof. It is a general law for public purposes, is uniform in its application, and therefore cannot be considered as violative of section 11 of Article XII. By its provisions a foreign corporation is not given greater rights or privileges than those enjoyed by a domestic corporation. The act applies to both domestic and foreign corporations alike. The situation is one which the state must meet as equitably as possible in deference to paramount authority. (State v. Silver Bow Refining Co., supra.) In this instance it has done so.

In our opinion the provisions of section 11 of Article XV are not so transgressed as to nullify the Act. It is not a local or special law, but rather a general statute, and therefore argument to the effect that it is violative of the provisions of section 26 of Article V is wholly without merit.

[fol. 42] The judgment is affirmed.

Albert J. Galin, Associate Justice.

We concur: Lew L. Callaway, Chief Justice. Henry L. Myers, Albert P. Stark, John A. Matthews, Associate Justices.

[fol. 43] SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed April 27, 1928

Petition for Appeal

Considering itself aggrieved by the final judgment of the Supreme Court of the State of Montana in the above entitled cause the appellant herein, Hart Refineries, a Corporation, hereby prays for an order that an appeal be allowed appellant to the Supreme Court of the United States, and for an order directing the Honorable Judges of the Supreme Court of Montana, under the seal, to send the record, proceedings and judgment aforesaid, with all things concerning the same and the order allowing an appeal, and all things relating to said appeal, to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Hart Refineries, appellant, assigns the following errors in the record and proceedings of the said case.

[fol. 44] The Supreme Court of the State of Montana erred in rendering judgment in favor of appellee, and against appellant as follows:

First. The Supreme Court of the State of Montana erred in overruling plaintiff's demurrer to the defendant's answer for the reason that the provisions of the Montana Gasoline Tax Law, upon which said tax was based, were unconstitutional and void, by reason of which appellant was injured in its business in the respect hereinafter set forth.

Second. The Supreme Court of the State of Montana should have held Sections 2382 and 2383 of Chapter 186 of

the Laws of 1925 of Montana void as being in violation and contravention of the provisions of Section 1, Article 14 of Amendments to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws."

Third. The Supreme Court of the State of Montana should have held said tax denied appellant the equal protection of the laws.

Prayer for Reversal

For which errors, the appellant, Hart Refineries, prays that said judgment of the Supreme Court of the State of Montana dated January 31st, 1928 in the above entitled cause, be reversed and a judgment rendered in favor of said appellant for the amount demanded in its complaint and for costs.

John E. Patterson, Attorney for Appellant.

[File endorsement omitted.]

[fol. 45] In Supreme Court of Montana

[Title omitted]

Order Allowing Appeal—Filed April 27, 1928

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Montana being the highest court of said state in which a decision in the cause could be had, between Hart Refineries, a corporation, appellant, and W. E. Harmon, as Treasurer of the State of Montana, appellee, wherein was drawn in question the validity of a statute of the State of Montana, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity; It appears to me, the undersigned, Chief Justice of the Supreme Court of the State of Montana, that the said Hart Refineries, a corporation, appellant, having presented to me its petition for allowance of an appeal

from said judgment of the Supreme Court of the State of Montana to the Supreme Court of the United States, together with Assignment of Errors and Prayer for Reversal to that end: and it appearing that said Hart Refineries, appellant, is entitled to have said judgment reviewed by the Supreme Court of the United States; and is entitled to an order allowing an appeal, and being willing that error, if [fol. 46 & 47] any hath occurred, should be duly corrected and full and speedy justice done to the parties aforesaid, I do hereby order that an appeal be allowed appellant to the Supreme Court of the United States, and I do hereby order a bond to be furnished by appellant which I fix at the amount of $1,000.00 to be approved by me, and I do in consideration of the premises, to you the Honorable Judges of the Supreme Court of the State of Montana, Greeting:

Command you that under your seal, distinctly and openly, send the record, proceedings and judgment aforesaid with all things concerning the same, and all things relating to this appeal to the Supreme Court of the United States, together with this order allowing an appeal, and that you have the same in the said Supreme Court at Washington, D. C. within sixty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness, my hand this 27th day of April, 1928.

Lewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[File endorsement omitted.]

[fols. 48 & 49) Citation, in usual form, showing service on L. A. Foot and others, omitted in printing.

[fol. 50] Bond on appeal for $1,000, approved and filed May 2, 1928, omitted in printing.

[fol. 51] SUPREME COURT OF MONTANA

[Title Omitted]

PRAECIPE FOR RECORD—Filed May 16, 1928

The Clerk of the Supreme Court of the State of Montana is hereby directed to prepare and certify a transcript of the record of the above entitled cause for the use of the Supreme Court of the United States, by including therein the following:

I. The judgment roll containing:

(a) The second amended complaint.

(b) The answer to the second amended complaint.

(c) Demurrer to answer as amended.

(d) Order overruling demurrer.

(e) Reply to answer.

(f) Motion for judgment on the pleadings.

(g) Order sustaining motion for judgment on the pleadings.

(h) Order that judgment be entered for defendant.

(i) Judgment.

(j) Certificate to judgment roll.

(k) Minute entry extending time to prepare bill of exceptions.

(l) Bill of exceptions.

(j) Order settling bill of exceptions.

(k) Filing bill of exceptions.

II. Notice of Appeal.

[fol. 52] III. Assignments of error, as follows:

The District Court erred in rendering judgment in favor of respondent, and against appellant, as follows:

(1) The Court erred in overruling plaintiff's demurrer to the defendant's answer, for the reason that the provisions of the Montana Gasoline Tax Law, upon which said tax was based, were unconstitutional and void, by reason of which appellant was injured in its business.

(2) The Court should have held Section 2382 and 2383 of Chapter 186 of the Laws of 1925 void, as being in Violation and contravention of the provisions of Section One of Article Fourteen of Amendments to the Constitution of

the United States, which provides: "No state shall make or enforce any law, which shall deny to any person within its jurisdiction the equal protection of the laws."

(4) The Court should have held the said tax denied appellant the equal protection of the laws.

IV. The opinion of the Supreme Court of the State of Montana, delivered by the Court in deciding said cause on appeal, and the date thereof.

V. Petition for appeal from the Supreme Court of the State of Montana, to the Supreme Court of the United States, including "Assignment of Errors" and "Prayer for Reversal."

VI. Order allowing appeal by Chief Justice of the Supreme Court of Montana, fixing bond and directing that the record be sent to the Supreme Court of the United States.

VII. Citation to appellee with acceptance of service.

[fol. 53 & 54] VIII. Bond of appellant, with approval and notation that same to act as supersedeas.

IX. Original petition for appeal from the Supreme Court of the State of Montana to the Supreme Court of the United States, attached to record.

X. The Original Order allowing appeal by the Chief Justice of the Supreme Court of Montana, fixing amount of bond and directing that the record be sent to the Supreme Court of the United States, attached to record.

XI. This praecipe and acceptance of service, or proof of service thereof.

XII. Your certificate to the foregoing.

Dated this 8th day of May, A. D. 1928.

John E. Patterson, Attorney for Appellant.

Due service and filing of the foregoing praecipe is accepted and receipt of a copy thereof is acknowledged this 6th day of May, 1928.

L. A. Foot, Attorney General for the State of Montana; A. H. Angstman, Ass't Att'y Gen. of Montana, Attorneys for Appellee.

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56-58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 210

HART REFINERIES, a Corporation, Appellant, vs. W. E. HARMON, as State Treasurer of the State of Montana, Appellee

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 19, 1928

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

John E. Patterson, Attorney for Appellant.

Due service of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is accepted and receipt of a copy thereof acknowledged this 13th day of June, A. D. 1928.

L. A. Foot, Attorney General of Montana; A. H. Angstman, Assistant Attorney General of Montana, Attorneys for Appellee.

Endorsed on cover: File No. 33,519. Montana Supreme Court. Term No. 210. Hart Refineries, Appellant, vs. W. E. Harmon, as Treasurer of the State of Montana. Filed June 16th,1928. File No. 33,519.